No. 92-1625

In The

Supreme Court of the United States

October Term, 1992

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA and UNITED MINE WORKERS OF AMERICA, DISTRICT 28,

Petitioners,

v.

JOHN L. BAGWELL, SPECIAL COMMISSIONER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether fines assessed in accordance with a prospective fine schedule, designed to coerce a recalcitrant party from continuing to violate an injunction that both prohibits unlawful conduct and requires certain affirmative conduct, are "civil" in nature where the recalcitrant party has the power to avoid the specified fines by complying with the court's orders?

2. Whether the Virginia Supreme Court was correct in holding that it is a matter of state, not federal, law whether the subsequent settlement of underlying civil litigation necessarily moots coercive, civil sanctions imposed during the litigation?

3. Whether contempt fines assessed in accordance with a prospective fine schedule imposing a specific amount for each *future* violation of an injunction contravene either the Due Process Clause of the Fourteenth Amendment or the Excessive Fines Clause of the Eighth Amendment, where the contemnor can avoid additional fines at any time merely by complying with the court's lawful injunction?

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STATEMENT OF THE CASE

This case concerns the efforts of a trial court to coerce, through the imposition of a prospective schedule of contempt fines, union officials to cease and desist acts of violence, intimidation and damage and to take affirmative actions to prevent union members and sympathizers from engaging in such acts. The Union steadfastly ignored the court's attempt to stop the reign of terror and violence, accumulating in the process an expensive total of civil contempt fines.

1. The strike that gave rise to this action was called on April 5, 1989, by the President of petitioner United Mine Workers of America ("UMW" or the "Union") against two coal companies in southwestern Virginia. When the companies tried to maintain operations, the UMW announced that it would engage in "a new level of creative militancy" against the companies. The Bureau of National Affairs, Inc. "Daily Labor Report" No. 153, p. A-11 (1990). The UMW later said that the strike was against the entire state of Virginia.[1]

2. On April 12, 1989, the coal companies filed a verified bill of complaint seeking to enjoin the Union from engaging in certain unlawful activities. On April 13, 1989, after an evidentiary hearing, the trial court enjoined the Union from engaging in certain violent, intimidating, and damaging acts. (App. 118a-121a). On April 21, 1989, the trial court amended and strengthened its injunction, finding that, notwithstanding the initial injunction, "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued. . . . " (App. 113a-116a).

The injunction not only *prohibited* the Union from engaging in certain actions, it also *required* that Union

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[1] *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1294 n.4 (W.D. Va. 1990).

officials take certain *affirmative* steps to stop acts of violence and intimidation by Union members and sympathizers. For example, the injunctive orders issued by the trial court affirmatively directed the Union to place a designated supervisor or captain at each picket site to enforce the injunction; to make available the names of strike supervisors to law enforcement officials; to report to the court in writing all violations of the injunction; and to use all lawful means reasonably available to ensure compliance with the injunction. (App. 115a-116a, 120a).[2]

3. Despite these measures, wholesale violations of the court's injunction continued. The trial court ordered the Union to show cause why it should not be held in contempt. After the first contempt hearing, the trial court found 72 separate violations of its injunction. (App. 109a). The trial court imposed $642,000 in fines, $424,000 of which were suspended. (App. 4a n.2; Bagw. App. 55-57). Subsequently, the trial court vacated *all* of these initial fines on the ground they were punitive, and hence "criminal in nature," because the Union was not given the opportunity to avoid them once they were specified. (App. 4a n.2).

After the first contempt hearing, the trial court also established a prospective fine schedule designed to coerce the Union to refrain from committing future violations of the injunction. The schedule provided for fines of $100,000 for each violent violation and $20,000 for each nonviolent violation. (App. 111a). When it established the prospective fine schedule, the trial court made clear that

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[2] References to the Appendix filed in this Court will be made as "App. ___." In the Virginia Supreme Court, the cases were appealed by two separate record numbers and consisted of three separate appendices. References to the record in the appeal initiated by Bagwell will be by "Bagw. App. ___." References to the record in the appeal initiated by the UMW will be by "UMW App. ___." References to documents in the Virginia Court of Appeals' Record certified to the Virginia Supreme Court will be "C.A. App. ___."

it was attempting to coerce the Union into complying with its orders, and that the Union could avoid paying any fines merely by complying with the court's injunction:

> [T]he union and its members are responsible for how much money . . . is going to be paid, not this Court, not the company, not anyone else. If you go out and violate the law, you are taking that action of your own free will and . . . you will pay the consequences, because it is your act.
>
> . . .
>
> I firmly believe that the fate of the union with regard to these violations is in the hands of those members and leadership that we have seen here in court today. . . . I sincerely hope that you will be able to conduct yourself in a law abiding manner. . . .

(Bagw. App. 575, 579).

4. Notwithstanding the prospective fine schedule, the Union continued to violate the injunction. "As time passed, the violations increased in frequency and became more violent." *Bagwell v. International Union, UMWA*, 224 Va. 463, 476, 423 S.E.2d 349, 357 (1992) (App. 14a). (*See also* UMW App. 544-45, 548-49, 581-82, 598-600, Bagw. App. 1487-92, 1604-07, 1674.) The trial court found on the record that the strike was "characterized by violence and terrorism." (Bagw. App. 3191).

For example, the record in this case demonstrates that Union members frequently engaged in rock throwing. (UMW App. 491-94, 518-19, 568-69). Union members also placed "jackrocks" (iron spikes in the shape of a star used to puncture tires) on area roads. (UMW App. 493-96, 509, 540-41, 567, 570, 576-78). Indeed, so bad were the jackrock attacks that the state police had to use a "magnet truck" daily to clear the roads of jackrocks, nails and other tire-puncturing devices. (Bagw. App. 328). Jackrocks were also placed near the homes of company employees where their children could step on them.

(Bagw. App. 1607). Strikers doused the face of a company guard with acid. (UMW App. 581-82). Women whose husbands worked for the coal companies were threatened and attacked by strikers. (Bagw. App. 1492, 1487-91, 1604-07, 2710-12). Workers were pulled off the road, threatened, and in some instances beaten, by strikers. (UMW App. 544-45, 548-49, 610-21). There was repeated gunfire. (UMW App. 490, 520, 590, 591-92, 607). And smashed windshields and flattened tires became a way of life for area residents. (Bagw. App. 436-38, 1146-47, 1173-74, 1535, 1538-40).

5. In trying to stop this reign of terror, the trial court was forced to issue no fewer than *eight* separate contempt orders against the Union. (*See, e.g.*, App. 55a). Prior to the entry of each contempt order, the Union was served with a show cause order outlining specifically the alleged contumacious conduct. (*See, e.g.*, UMW App. 26-42, 66-73, 86-92). Discovery was utilized. Lengthy hearings were held with respect to each contempt order. The Union was represented by counsel, and the court required that violations be proved by a strict standard. (UMW App. 267; Bagw. App. 1943, 1947, 2914-16, 3188, 4172). The Union presented evidence and cross-examined opposing witnesses. The court heard myriad witnesses, reviewed hundreds of exhibits, and considered oral argument. The record of the proceedings is literally thousands of pages.

6. Throughout the eight contempt proceedings, the court imposed two types of fines. Civil compensatory fines were assessed, payable to the coal companies, based on the harm caused to them. Those fines are not at issue here. The court also assessed coercive fines in accordance with the prospective fine schedule.

The court repeatedly stated that the purpose of the prospective fine schedule was to coerce the Union into complying with the court's orders. For example, after the second contempt hearing, the trial court stated:

> I don't know how much money these defendants are willing to pay before they will obey the law. I hope [the fine schedule] will deter any future violations.

(Bagw. App. 886). Over and over again, in the course of the eight contempt hearings, the trial judge made clear that the purpose of the fines assessed under the prospective fine schedule was to compel compliance, and that the Union could avoid the prospective fines by complying with the injunction:

> The Court is convinced, as [it has] stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be assessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as [they] are stated or . . . outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil.

(UMW App. 222).

7. But the Union would not comply, and the fines accumulated under the prospective fine schedule. All together, over the course of seven additional contempt hearings following the establishment of the fine schedule, the trial court found hundreds of violations of the injunction, most of them *violent*. In total, the Union accumulated over $64 million in fines.

8. After months of violence and terror, the Union and the coal companies ultimately settled their labor dispute and the strike ended. As part of the settlement of the labor dispute, the parties moved the trial court to vacate all fines. (UMW App. 163-66). After considering the matter, the trial court agreed to vacate approximately $12 million in compensatory civil fines (*see* Bagw. App. 2152, 3566, 4270, 4274) that were payable to the companies for damage and harm caused by violations of the injunction. (App. 48a).

The trial court refused to vacate, however, the remaining $52 million in coercive civil fines that had been assessed in accordance with the fine schedule and that

were payable to the Commonwealth of Virginia and the two affected counties. In refusing to vacate these fines, the trial judge emphasized yet again that the purpose of these prospective fines had been to try to compel compliance with the court's orders:

> The Court early on announced its purpose in imposing prospective civil fines the payment of which would only be required if it were shown the defendants disobeyed the Court's orders. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional and it was within the defendants' sole power to avoid payment of the fines.

(App. 40a-41a).

The trial court appointed Special Commissioner John Bagwell to collect the outstanding fines. (App. 51a-52a).

9. The Union appealed the trial court's contempt orders and fines to the Virginia Court of Appeals. The Union argued that the remaining fines were "criminal," not civil, and therefore were imposed without the full-blown constitutional protections attending criminal proceedings. The Union also argued that the settlement of the underlying labor dispute and litigation rendered the fines moot.

The Court of Appeals treated the fines imposed in accordance with the prospective fine schedule as "civil" and found that "the [trial] court imposed the fines in question to coerce compliance with its orders . . . " The Court, therefore "conclude[d] that these fines were coercive civil fines . . . " *International Union, UMWA v. Clinchfield Coal Co.*, 12 Va. App. 123, 129, 402 S.E.2d 899, 903 (1991) (App. 31a-32a). The Court of Appeals also found that the extent of the Union violence, lawlessness and misconduct "reasonably required" fines of "considerable magnitude." *Id.*

On the question of mootness, the Court of Appeals found to be "eloquent" the decision in *Clark v. International Union, UMWA*, 752 F. Supp. 1291 (W.D.Va. 1990),

arising out of the same labor dispute as this case, holding that, *as a matter of federal law*, the settlement of the underlying litigation does not necessarily moot civil contempt fines imposed in a completed proceeding prior to settlement. 12 Va. App. at 131, 402 S.E.2d at 904 (App. 34a). However, the Virginia Court of Appeals concluded that the question of whether the subsequent settlement mooted the contempt fines was *a matter of state law*, and that binding state precedent required it to hold that the settlement of the underlying litigation mooted the coercive civil contempt fines. 12 Va. App. at 132, 402 S.E.2d at 904 (App. 34a).

10. The Virginia Supreme Court reversed. Applying this Court's precedents in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Hicks v. Feiock*, 485 U.S. 624 (1988), the Virginia Supreme Court concluded that the fines imposed in accordance with the prospective fine schedule were "civil," not criminal. In support of that conclusion, the Virginia Supreme Court found that the trial court's clear, express, and often-repeated purpose in establishing the fine schedule and imposing the fines was to "coerce the Union into compliance with the court's injunction." 244 Va. at 476-77, 423 S.E.2d at 357 (App. 14a-15a). The court also found that the Union "controlled its own fate," and under the fine schedule had the power to avoid the specified fines merely by ceasing to violate the trial court's injunction. *Id.*

The Virginia Supreme Court rejected the Union's argument that the fines were criminal *merely* because they were imposed for violation of an injunction that *prohibited the doing of an act*, rather than for violation of an injunction that *affirmatively required the performance of an act*. In rejecting this argument the Court found that the coercive nature of the fines imposed in this case and the Union's ability to avoid the prospective fines by complying with the court's orders – hallmarks of "civil" fines – did not in any way depend on the prohibitory or mandatory nature of the underlying injunction.

The Virginia Supreme Court also rejected the Union's argument that the settlement of the underlying labor dispute and litigation *required* the trial court to vacate *all* of the civil fines imposed against the Union. The Virginia Supreme Court "agree[d] with the Court of Appeals that 'whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation *is a matter of state law*,' " and held *as a matter of state law* that the fines in question were not moot. 244 Va. at 478, 423 S.E.2d at 358 (App. 16a) (emphasis added).

The Court also found, in light of the financial strength of the UMW, the gravity of the harm caused by the UMW's wrongdoing, and the UMW's scorn for the rule of law, that the civil coercive fines were not excessive and did not constitute an abuse of discretion. 244 Va. at 479-80, 423 S.E.2d at 359 (App. 18a-19a).

REASONS FOR DENYING THE WRIT

None of the questions presented by the petition for certiorari in this case warrant review by this Court:

1. The primary question presented by the petition – pertaining to the distinction between civil and criminal contempt – involves nothing more than a routine application of well-settled law – *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Hicks v. Feiock*, 485 U.S. 624 (1988) – to the facts of this case.

a. "The demarcation between civil and criminal contempt is well-established" and not in need of clarification. *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). This Court has held that the difference between civil and criminal contempt depends "not [on] the fact of punishment but rather [the] *character* and *purpose*" of the sanction imposed. *Gompers*, 221 U.S. at 441 (emphasis added). With respect to purpose, a civil contempt sanction is *coercive* in nature. As this Court held in *United Mine Workers*, 330 U.S. at 303-04, a civil contempt

is designed to compel a recalcitrant party to obey the court's orders. In contrast, a criminal contempt sanction is imposed primarily to *punish* the contemnor for disobeying the court. *Id.* at 302-03. With respect to the character of the penalty imposed, criminal contempt imposes a "determinate and unconditional" penalty, whereas a civil coercive contempt sanction is "conditional," in that it gives the contemnor the chance to avoid the penalty by complying with the court's orders. *Hicks*, 485 U.S. at 632-33. *See* pp. 12-13, *infra*.

b. In a unanimous opinion, the Virginia Supreme Court applied these well-settled principles with care in this case. After reviewing the voluminous record, including the eight separate contempt hearings, the Virginia Supreme Court concluded that the fines imposed after the *first* contempt hearing were properly vacated because they were "determinate and unconditional," and hence they had been improperly imposed without the constitutional safeguards that must accompany criminal contempt. As to the subsequent fines remaining on appeal, however, the Virginia Supreme Court held that they were civil in nature because (i) they were imposed for the express purpose of trying to force the Union to comply with the court's orders, and (ii) their character was "conditional" inasmuch as they were imposed only after the Union violated the prospective schedule of fines set up by the court to deter additional violations. 244 Va. at 475-76, 423 S.E.2d at 356-57 (App. 12a-15a). Contrary to petitioners' protestations, the Virginia Supreme Court's decision on this issue is entirely consistent with *Gompers* and *Hicks*.

c. Moreover, petitioners concede that the decision below is consistent with the decisions of other lower courts. It appears that every court to consider the issue has held that fines imposed as a result a party's violation of a prospective fine schedule are civil within the meaning of *Gompers* and *Hicks* if they are imposed to coerce the party to comply with the court's earlier orders. Because there is no conflict on this issue, which is the only issue

genuinely presented by *this* case, certiorari should be denied. *See* pp. 16-18, *infra*.

d. Petitioners attempt to recharacterize *Gompers* and *Hicks* as setting forth a rigid rule that a contempt sanction is criminal if it was imposed for violation of an order that *prohibited* the contemnor from acting in a certain way, as opposed to an order that required the contemnor to do an *affirmative act*. This attempt is totally unavailing. *See* pp. 18-20, *infra*.

First, petitioners are wrong that *Gompers* and *Hicks* established a mechanical test based on whether the underlying injunction was "mandatory" or "prohibitory." On the contrary, in both cases, this Court recognized that there is no rigid formula for distinguishing between civil and criminal contempt.

Second, petitioners do not cite a single case from any jurisdiction holding that *Gompers* or *Hicks* makes the so-called "mandatory/prohibitory" distinction the *sine qua non* of the difference between civil and criminal contempt. The lack of any split of authority militates strongly against granting certiorari on this question. *See* pp. 20-21, *infra*.

Third, this Court has itself approved the use of civil coercive sanctions in cases where the contemnor failed to comply with a "prohibitory" order. *See* p. 22, *infra*.

Fourth, the effect of petitioners' proposed recharacterization of *Gompers* and *Hicks* would be radical and absurd. In petitioners' new world, the mechanism of a prospective fine schedule would be unworkable because it could be applied only through the lengthy and cumbersome criminal process that would occur solely *after* the wrongdoing. Petitioners' rigid rule would also lead to absurd results, since petitioners' mandatory/prohibitory distinction would logically apply as well to *administratively* or *legislatively*-imposed fines. Thus, in one fell swoop, petitioners' new rule would call into question the constitutionality of a host of statutory procedures for imposition of administratively or legislatively-imposed

civil fines based on "prohibitory" laws. *See* pp. 22-23, *infra*.

Fifth, even if there were merit to petitioners' bright-line rule, this case does not cleanly present the issue. The trial court's orders were partly prohibitory and partly mandatory within the sense used by petitioners. Thus, this case does not properly present even the issue that petitioners attempt to inject into it. *See* pp. 23-24, *infra*.

2. The second question presented – whether the settlement of the underlying labor dispute renders moot the civil contempt fines imposed by the trial court payable to the Commonwealth of Virginia and two counties – does not raise any substantial federal question. The effect of a settlement on outstanding civil contempt fines is a matter of state law with which the federal courts should not interfere. But even if it were a federal question, the decision of the Virginia Supreme Court on this issue accords with analogous federal cases. *See* pp. 25-27, *infra*.

3. The final reason posited by the UMW for granting its writ is that civil coercive fines are somehow analogous to punitive damages in tort law or civil forfeitures under 21 U.S.C. § 881. Recent cases concerning allegedly excessive punitive awards in tort trials involving minor compensatory damages, and large forfeitures based on offenses involving relatively small amounts of drugs, are readily distinguishable from the fines at issue here. In this case, the UMW faced prospective coercive fine schedules which clearly indicated in advance the fines that would be assessed. There was no surprise. There is, therefore, no reason to hold this petition pending disposition of either *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992) or *Austin v. United States*, No. 91-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993).

Moreover, here the UMW fails to present any meaningful argument that the fines imposed were excessive or disproportionate in light of the relevant factors to be considered in fixing coercive fines. *United Mine Workers*,

330 U.S. at 304. After treating the court's authority as a joke, and the violation of court orders as a badge of honor, the UMW now seeks to avoid the clear consequences of its contumacious conduct by wrapping itself in the same "law" which it so thoroughly reviled below. The trial court did not abuse its discretion in assessing these prospective, coercive fines. The fact that the fines reached high amounts is indicative only of: (a) the unprecedented level of scorn with which the UMW treated court orders and (b) the wealth of the contemptuous party.

In addition: (1) though the Virginia Supreme Court expressly held that the amounts of the fines in this case were "not . . . excessive as a matter of law," it did not specifically address whether the Excessive Fines Clause of the Eighth Amendment applies either to the States generally or to court-imposed civil contempt fines in particular; and (2) the Virginia Supreme Court's conclusion that the fines are not "excessive as a matter of law" is consistent with the broad proportionality principles previously announced by this Court. Therefore, no further review of the excessiveness issue is warrranted.

I. THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT IS "WELL SETTLED," THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH ANY DECISION OF AN INFERIOR FEDERAL COURT OR A STATE COURT OF LAST RESORT.

A. The Distinction Between Civil Contempt and Criminal Contempt is Well Settled.

"The demarcation between civil and criminal contempt is well-established." *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). In *Gompers*, this Court held that the difference between civil and criminal contempt lies "not [in] the fact of punishment, but rather [in the] character and purpose" of the contempt sanction.

221 U.S. at 441. The Court explained that a contempt sanction is generally considered civil where its purpose is either to remedy harm caused to the other party by the contempt, or to coerce the recalcitrant party to obey the Court's orders. *Id.* at 442. *See also United Mine Workers*, 330 U.S. at 303-04. By contrast, the purpose of criminal contempt is more exclusively "punitive," 221 U.S. at 441, and is generally divorced from any "coercive or remedial" goal. *Id.* at 442.

More recently, in *Hicks v. Feiock*, 485 U.S. 624 (1988), this Court elucidated the general principles of *Gompers*. In *Hicks*, the Court explained that where the contempt penalty imposed is "determinate and unconditional," its purpose is " 'solely and exclusively punitive in character,' " and hence generally criminal in nature. *Id.* at 632-33. On the other hand, where the contempt penalty is "conditional," in the sense that the contemnor " 'has it in his power to avoid any penalty,' " and thus " 'carr[ies] the keys of [its] prison in [its] own pockets,' " the purpose of the contempt is more coercive, and hence civil, in nature. *Id.* at 633 (citations omitted). *See also Penfield Co. v. SEC*, 330 U.S. 585 (1947); *Shillitani v. United States*, 384 U.S. 364 (1966).

Although "it may not always be easy to classify a particular [sanction] as belonging to either" the civil or criminal category, *Gompers*, 221 U.S. at 441, these "principles have been settled at least in their broad outlines for many decades." *Hicks*, 485 U.S. at 631; *see also Terry*, 886 F.2d at 1350.

Moreover, "[w]hen a State's [contempt] proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority 'in a nonpunitive, noncriminal manner.' " *Hicks*, 485 U.S. at 631 (citation omitted). "[O]ne who challenges the State's classification of the relief imposed as 'civil' or 'criminal' [must] show *'the clearest proof'* that it is not correct as a matter of federal law." *Id.* (emphasis added).

B. The Decision Below Correctly Applies the Principles Set Forth in Gompers and Hicks.

The decision below correctly sets forth the governing law of *Gompers*, *United Mine Workers*, and *Hicks*:

> Contempts are classified as either "criminal" or "civil," although each " 'may partake of the characteristics' of the other.' " *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). "It is not the fact of punishment but rather its character and purpose, that often serve to distinguish between the two classes of cases." *Id.* The punishment, whether fine or imprisonment, is deemed to be criminal if it is determinate and unconditional, and such penalties "may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632-33 (1988). The punishment is deemed to be civil if it is conditional and a defendant can avoid such a penalty by compliance with a court's order. *Id.* at 633. Civil contempt sanctions are either compensatory or coercive. Compensatory, civil contempt sanctions compensate a plaintiff for losses sustained because a defendant disobeyed a court's order. Coercive, civil contempt sanctions are imposed to compel a recalcitrant defendant to comply with a court's order. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); Gompers, 221 U.S. at 448; *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 753-54 (4th Cir. 1989).

244 Va. at 475, 423 S.E.2d at 356 (App. 12a-13a).

After faithfully setting forth these well-settled principles, the Virginia Supreme Court then applied them with great care. First, the Court noted that the fines imposed by the trial court after the first contempt hearing were properly vacated because they were, under the principles set forth above, *criminal* in nature. These fines were imposed based on the Union's numerous injunction violations *before* the trial court set a prospective schedule of

fines for future violations. Because the Union had no real opportunity to avoid these fines once they were announced, the Virginia Supreme Court explained that they were "determinate and unconditional" and thus fell on the criminal side of the *Gompers-Hicks* line.

The remainder of the fines at issue on appeal were of an entirely different sort – those assessed for violation of the prospective fine schedule established by the trial court after the first contempt hearing. With respect to these fines, after reviewing the voluminous record, the Virginia Supreme Court made two important findings: First, the trial judge had expressly and clearly stated that he was "establish[ing] a prospective fine schedule in an effort to coerce the Union into complying with the court's injunction." 244 Va. at 476, 423 S.E.2d at 357 (App. 13a). Second, the Court found, as the trial court had repeatedly stated on the record, that the prospective fine schedule gave the Union "the power to avoid imposition of [the] fines" merely by complying with the Court's outstanding orders. *Id.* (App. 14a). Based on these determinations, the Virginia Supreme Court concluded that these fines were conditional within the meaning of *Gompers* and *Hicks* and hence civil, not criminal, in nature.

This is a faithful, correct application of *Gompers* and *Hicks*. Petitioners' view that the fines imposed under the fine schedule were punitive, and hence criminal, reflects the mistaken assumption that the mere fact that the fines imposed by the prospective schedule ultimately became due transformed a prospective, coercive remedy into an exclusively punitive criminal penalty. But that view has been roundly rejected by the lower federal courts. For example, in *Hoffman v. Beer Drivers & Salesmen's Union Local No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976), the court held that the mere fact that a conditional contempt fine ultimately becomes due does not make it punitive (and hence criminal):

> [I]nevitably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. The

> due date occurs because the actor has failed to use the key to the jail which the court provided. . . . The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

See also N.L.R.B. v. Blevins Popcorn Co., 659 F.2d 1173, 1185 & n.74 (D.C. Cir. 1981); *Brotherhood of Locomotive Firemen and Engineers v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570 (D.C. Cir.) *cert. denied* 387 U.S. 570 (1967).

In short, the Virginia Supreme Court's application of *Gompers* and *Hicks* to the specific facts of this case – where the trial court imposed a prospective fine schedule in order to coerce the Union into complying with the court's injunctions – is nothing more than a routine application of the well-settled principles established by those cases. And surely, petitioners cannot possibly establish by "the clearest proof," as *Hicks* requires, 485 U.S. at 631, that the Virginia Supreme Court's classification of the fines as coercive and conditional is incorrect as a matter of federal law.[3] Thus, there is no reason for further review of this case.

C. The Decision Below Accords With the Unanimous View of Other Courts that Fines Imposed Under a Prospective Fine Schedule Intended to Coerce a Party to Comply with Outstanding Court Orders are Civil in Nature.

As petitioners effectively concede, the Virginia Supreme Court's holding is in accord with the

[3] It is wrong and unfair to describe the Virginia Supreme Court's decision, as petitioners have, as "singular in its disdain for *Gompers* and *Hicks* as constitutional precedents of binding force." Pet. at 7.

overwhelming majority of courts that have considered whether coercive fines imposed under a prospective fine schedule are civil under the reasoning of *Gompers* and *Hicks*.

For example, in a line of cases involving the efforts of "Operation Rescue" to block access to abortion clinics, three different United States Courts of Appeal have recently held that fines assessed according to a prospective schedule intended to coerce a party from continuing to take action prohibited by an injunction are "civil" within the meaning of *Gompers* and *Hicks*. That is so, these courts have rightly concluded, because such fines are "entirely conditional and coercive," and the offending party has the opportunity to avoid them if it ceases violating the court's orders.

Thus, in reviewing the award against Operation Rescue for each subsequent daily violation of the trial court's injunction, the Second Circuit held in *New York State National Organization for Women v. Terry*:

> [T]here is no doubt that the sanctions were entirely conditional and coercive. . . . The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties then-existing legal rights . . . . Faced on May 5, 1988 with a choice between compliance or non-compliance with the district court's order, defendants chose the latter course.
>
> . . . Thus, since the sanctions were imposed to compel obedience to a court order they are *civil* in nature.

886 F.2d at 1351 (emphasis added). This Court denied certiorari. 495 U.S. 947 (1990).

Both the Third and the Ninth Circuits have likewise held that fines imposed according to a prospective fine schedule and intended to coerce compliance with the court's injunction against unlawful conduct are "civil" within the meaning of *Gompers* and *Hicks*. *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *Aradia Women's Health*

Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991). *See also NOW v. Operation Rescue*, 1993 U.S. Dist. LEXIS 2972 (D.D.C. Mar. 15, 1993).

Similarly, in upholding fines imposed under a prospective schedule against the former air traffic controllers' union for its violation of an injunction against continuing a strike, the United States District Court for the District of Columbia concluded that the argument that such fines were "punitive, rather than coercive, [was] *meritless*." *United States v. PATCO*, 110 LRRM 2858, 2864 (D.D.C. 1982) (emphasis added).

Finally, in a case involving the very same UMW strike at issue in the present petition, the United States District Court for the Western District of Virginia opined that "fines assessed under a prospective fine schedule issued in an effort to halt prohibited conduct certainly appear to fall within the Supreme Court's definition of civil contempt fines." *Clark v. International Union, UMWA*, 752 F.Supp. 1291, 1297 n. 7 (W.D.Va. 1990).

Significantly, petitioners do not cite a case from any jurisdiction that conflicts with these cases on the only federal issue genuinely presented – whether fines imposed under a prospective fine schedule to coerce a defendant to cease violating a court order are civil within the meaning of *Gompers* and *Hicks*. Petitioners' failure to identify any conflict on this issue militates strongly against further review.

D. Gompers and Hicks Do Not Establish a Rigid, Bright-Line Rule that a Contempt Sanction is Criminal Merely Because it was Imposed for a Violation of a "Prohibitory" Order.

The Virginia Supreme Court rejected petitioners' argument that, despite the conditional, coercive nature of the fines imposed on the union under the prospective fine schedule, those fines were criminal *merely* because the underlying injunction violated by the Union "prohibit[ed] the doing of an act," rather than required the

Union "to perform an affirmative act." 244 Va. at 477, 423 S.E.2d at 357 (App. 15a). (Emphasis deleted).

According to petitioners, *Gompers* and *Hicks* establish that *whenever* contempt fines are imposed for violation of a "prohibitory" order – *i.e.*, an order that prohibits the defendant from taking certain action – rather than for violation of a "mandatory" order – *i.e.*, an order directing the defendant to perform an affirmative act – the fines are exclusively punitive, and hence criminal, in nature. Petitioners claim that the lower courts are in revolt against this rule, and that this Court should grant the petition for certiorari in this case to bring the lower courts back in line with *Gompers* and *Hicks*.

For several reasons, petitioners' reliance on a rigid, bright-line "prohibitory/mandatory" distinction is unavailing.

First, neither *Gompers* nor *Hicks* makes the "prohibitory/mandatory" distinction the *sine qua non* of the difference between civil and criminal contempt. To be sure, in *Gompers*, this Court stated that "[t]he distinction between refusing to do an act commanded, – remedied by *imprisonment* until the party performs the required act –; and doing an act forbidden, – punished by *imprisonment* for a definite term –; is sound in principle, and *generally*, if not universally, affords *a* test by which to determine the character of the punishment." 221 U.S. at 443 (emphasis added). But that this distinction is *"generally"* sound, and that it provides *"a"* test for distinguishing between civil and criminal contempt, does not mean that it is the *exclusive, rigid, bright-line* determinant of the difference.

This Court's statement in *Gompers* must be understood in the context in which it was made. The Court was addressing the nature of *imprisonment for a definite term* for violation of a prior order not to engage in certain conduct. In that situation, the contempt is criminal because there is generally nothing the defendant can do to avoid the sanction, once announced; thus, the contempt is more exclusively punitive in nature. The *Gompers* Court was *not*, however, addressing the situation where,

by reason of a prospective sanctions schedule set up only after finding that the defendant had violated a prohibitory order, the defendant is afforded the opportunity to avoid the specified sanctions by ceasing its violation. In that situation, where the defendant effectively "carr[ies] the keys of [his] prison in [his] own pockets," *Hicks*, 485 U.S. at 633, the fine schedule is more coercive than punitive, and hence the contempt is more properly classified as civil.

Rather than setting up a mechanical formula, *Gompers* and *Hicks* make clear that the ultimate inquiry in deciding between civil and criminal contempt requires a careful assessment of the "character and purpose" of the contempt sanction imposed. *Gompers*, 221 U.S. at 441. *See also Hicks* ("[T]he critical features [of the difference between civil and criminal contempt] are the substance of the proceeding and the character of the relief that the proceeding will afford"). A prospective fine schedule is no less coercive (and hence civil) because it seeks to encourage the contemnor to refrain from prohibited action rather than take required action. Plucked wholly out of context and elevated to a formalistic, bright-line rule, as petitioners use it, the "prohibitory/mandatory" notion is indeed a "distinction without a difference." 244 Va. at 477, 423 S.E. 2d at 357 (App. 15a).

Second, it is significant that petitioners do not identify a single case from any jurisdiction interpreting *Gompers* and *Hicks* as establishing a bright-line rule based on whether the underlying injunction was "mandatory" or "prohibitory." Rather, petitioners concede that lower federal courts have held that the statements in *Gompers* and *Hicks* relied on by petitioners were "not intended to be a dispositive test." *Latrobe Steel Co. v. United Steel Workers*, 545 F.2d 1336, 1343 n. 27 (3d Cir. 1976) (citing *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344 (7th Cir.), *cert. denied*, 427 U.S. 858 (1976)).

Indeed, innumerable decisions which have held that fines imposed under a prospective schedule are generally

civil in nature involved injunctions that were "prohibitory" in character. And numerous other cases have recognized that a court may employ prospective civil fines in a prohibitory setting. For example, the Fifth Circuit has held:

> A party may be held in contempt if he violates a definite and specific court order requiring him to perform or *refrain from performing* a particular act or acts with knowledge of that order. The civil contempt sanction is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court.

Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) (emphasis added). *See also Clark*, 752 F. Supp at 1297; *Labor Relations Comm'n v. Fall River Educators Assoc.*, 382 Mass. 465, 475-76, 416 N.E. 2d 1340, 1347 (Mass. 1981) (fine for civil contempt imposed where judge announced a fine would be levied for each day of illegal strike); *NOW v. Operation Rescue*, 1993 U.S. Dist. LEXIS 2972 (D.D.C. Mar. 15, 1993) (civil contempt fine levied against violators of injunction forbidding interference with medical facilities and providing for fine for each violation).

Even the one case described by petitioners as a "lucid and persuasive counter-example" (Pet. at 14) of the scores of decisions that undermine their position – *In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987) – expressly recognizes that the mandatory/prohibitory dichotomy is *not* the bright-line determinant of the difference between civil and criminal contempt:

> However, the test for distinguishing between refusing to do an act commanded, which would permit a coercive remedy, and doing an act forbidden, allowing only punishment for the completed act of disobedience, affords *only a general test* to determine the character of the punishment. The Supreme Court itself recognized that this test was *not "universal[]." See Gompers, supra*.

413 N.W.2d at 398 (emphasis added).

The odd conclusion that petitioners draw from the fact that virtually no decisions from any jurisdiction support their extreme reading of *Gompers* and *Hicks* is that the lower courts are in mass revolt and that this Court must stop the revolution. The more natural conclusion to be drawn from the absence of support for petitioners' position is that petitioners are overreading *Gompers* and *Hicks* and that there is no revolution under way.

Third, this Court has itself approved civil coercive sanctions assessed in cases where the contemnor failed to comply with a prohibitory order. For example, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court upheld civil remedies imposed on a company that had been ordered to stop violating wage and hour laws. When the company failed to comply, the Administrator brought a contempt action and the court imposed financial sanctions payable to affected, non-party employees. This Court approved the remedial, civil sanctions. *Id.* at 193.

Similarly, in *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), this Court upheld the use of civil contempt sanctions imposed against a union to coerce compliance with a court order to cease all discrimination and enact certain affirmative action programs. The Court approved the use of the sanctions even though the underlying orders mainly prohibited conduct.[4]

Fourth, the effect of petitioners' bright-line "mandatory/prohibitory" dichotomy would be radical and absurd. If the mere fact that a contempt fine were imposed for a party's violation of a prohibitory injunction was enough to make the fine criminal, then courts would be deprived of one of the most effective means of securing compliance with their orders – namely, the setting of a prospective fine schedule for continued violation of

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[4] In addition, in *Department of Energy v. Ohio*, 503 U.S. ___, 118 L.Ed. 2d 255, 270 (1992), this Court cited with approval several cases in which prospective civil coercive contempt fines were used in the same manner as they were used here – to secure compliance with a prohibitory injunction.

their prohibitory orders. In petitioners' new world, a prospective fine schedule would be unworkable in practice because the court would have to conduct a collateral criminal proceeding to try to coerce compliance with its orders. Nothing in *Gompers* or *Hicks* requires handicapping the courts in that fashion.

In addition, there is no apparent principled justification for limiting petitioners' proposed rule to *judicially*-imposed fines. If the difference between a civil and criminal fine lies in the nature of the underlying command that it seeks to vindicate, why would not a *legislatively*-imposed or *administratively*-imposed fine for prohibited conduct also be considered "criminal"? For example, under petitioners' theory, why would not a fine imposed by the Environmental Protection Agency for dumping garbage in a manner prohibited by statute *automatically* become a criminal fine, requiring full-blown criminal procedures? Or, why would not a financial sanction by the Occupational Health and Safety Administration for a violation of its orders or regulations also be automatically deemed criminal? For that matter, why would not all parking fines automatically become criminal? Carried to its logical conclusion, petitioners' rigid "mandatory/prohibitory" distinction would, in one fell swoop, invalidate so many statutorily-authorized mechanisms for imposing civil fines as to defy meaningful estimate.

Fifth, in any event, this case does not cleanly present the "mandatory/prohibitory" issue. It is remarkable that petitioners emphasize the alleged "mandatory/prohibitory" dichotomy without even mentioning that the injunctive orders in this case sought not only to stop the Union from violating the law, but also directed the Union to take *affirmative action* to inform its members and sympathizers to do likewise.

For example the injunctive orders issued by the trial court directed the Union affirmatively to:

(1) place a designated supervisor or captain at each picket site to enforce the injunction;

(2) make available the names of strike supervisors to law enforcement authorities;

(3) report to the court in writing on all violations of the injunction; and

(4) use all lawful means reasonably available to them to ensure compliance with the injunction. (App. 115a-116a, 120a).

The Union failed to comply with any of these affirmative obligations.

The existence of these "affirmative" aspects to the court's injunction is important in two respects. First, it undermines the usefulness of petitioners' rigid dichotomy between "mandatory" and "prohibitory" injunctions as a basis for determining whether a given contempt fine is civil or criminal. For, as is the case here, had the Union complied with the affirmative acts demanded by the order, many, if not all, of the so-called prohibited acts of contempt would not have occurred. Second, in any event, the fact that the injunction in this case included both "mandatory" and "prohibitory" directives renders this case a poor vehicle for considering the appropriateness of the bright-line rule that petitioners propose, since even if petitioners prevailed on their legal theory it would not necessarily result in reversal of the judgment.

* * *

In sum, all of the traditional considerations that guide this Court's exercise of discretion militate strongly against review to consider whether petitioners' mechanical "mandatory/prohibitory" dichotomy requires a different result in this case.

II. THE VIRGINIA SUPREME COURT'S DECISION THAT THE SUBSEQUENT SETTLEMENT OF THE UNDERLYING LITIGATION IN THIS CASE DID NOT MOOT THE CIVIL CONTEMPT FINES PAYABLE TO THE STATE AND COUNTIES IS A MATTER OF STATE, NOT FEDERAL, LAW.

The Virginia Supreme Court held that state law, not federal law, governed the question whether the settlement of the underlying litigation in this case necessarily mooted the civil contempt fines assessed under the prospective fine schedule that were payable to the Commonwealth of Virginia and the two affected counties. 244 Va. at 478, 423 S.E.2d at 358 (App. 16a). That is correct; therefore Question 2 is not an appropriate matter for review by this Court.

Whether the settlement of civil litigation divests the courts of the Commonwealth of the power to uphold civil coercive fines which arose during the litigation raises no issue of federal law. It has been widely recognized that contempt orders issued by state courts are matters of state law. *Torres Irizarry v. Toro Goyco*, 425 F. Supp. 366, 369 (D. Puerto Rico 1976) (the contended invalidity of a contempt judgment issued by a court of the Commonwealth of Puerto Rico involved matters concerning "the power of [the courts of Puerto Rico] to punish for contempt. They have been presented to the highest court of the Commonwealth, which disposed of [the] contentions"); *Keegan v. Lawrence*, 778 F. Supp. 523, 526 (S.D. Fla. 1991) (Florida law deemed applicable to state court civil contempt proceedings).

This Court has also recognized that "[t]he contempt power lies at the core of the administration of a State's judicial system. . . . [F]ederal court interference with the State's contempt process is 'an offense to the State's interest.'. . . [Contempt] stands in aid of the authority of the judicial system, so that its orders are not rendered nugatory." *Juidice v. Vail*, 430 U.S. 327, 335-336 & n. 12 (1977), *citing Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). *See also Orr v. Orr*, 440 U.S. 268, 275 n. 5 (1979) (recognizing

that the survival of a state court contempt judgment "depends upon the resolution of somewhat knotty state-law problems.")

Where the operation of a state's contempt power runs afoul of no federal statutory or constitutional provision, the federal courts have no basis to intervene. Here, whether vested civil contempt fines survive settlement by the parties raise only state-law policy questions. Neither Article III standing requirements nor due process concerns are in any way meaningfully implicated by a state's decision to follow one rule or another on this issue. Accordingly, whether the fines became moot is a state law question that is not proper for review by this Court. For the same reason, all of the cases cited by petitioners in support of their view that the fines are moot are irrelevant. None of these cases involves the law of Virginia. Where matters of state law are involved, as they are here, it is well settled that the highest court of the state is the final arbiter of that law. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). The Supreme Court of Virginia has held that the fines here were not mooted by the settlement of the underlying litigation, and that decision is unaffected by other courts' rulings on this issue.

Even if, however, federal law governed the question of whether the coercive civil fines survive settlement of the underlying litigation, the decision below does not warrant review by this Court. As the Virginia Supreme Court correctly recognized, its decision, although resting on *state* law, is not inconsistent with *Gompers*.

In *Gompers*, which involved a *federal action*, the Supreme Court held that the settlement of the underlying litigation mooted the civil plaintiffs' claim for recovery of *compensatory*, civil fines assessed against the defendant union. But *Gompers* recognizes that the purpose of civil contempt fines may be either "remedial" *or* "coercive." *See* 221 U.S. at 442. Where a civil contempt fine is purely "remedial," it is paid to the complainant. *See id.* at 441.

But a civil contempt fine may also be more purely "coercive," in which case it is paid to the court or to the state. *Gompers* dealt only with whether a "compensatory" or "remedial" civil fine – payable to the complaining party – was mooted by reason of the settlement of the underlying litigation. That obviously does not foreclose the survival of fines payable to the court or the state.

There are plainly important and legitimate policy reasons for a different rule for "coercive" civil fines payable to the state. For, as the Virginia Supreme Court correctly held (albeit as a matter of state law):

> Courts . . . must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the Union's mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until settlement of the underlying litigation.

244 Va. at 478, 423 S.E.2d at 358 (App. 17a). A rule that allowed the party in contempt to moot coercive fines payable to the court or the state would totally undermine the effectiveness of civil contempt fines intended to coerce a party to comply with the court's legitimate orders.

Thus, even if the mootness question presented a question of federal law, which it does not, the Virginia Supreme Court's decision is consistent with both logic and precedent.

III. THE VIRGINIA SUPREME COURT'S DECISION THAT THE CONTEMPT FINES IN THIS CASE DO NOT VIOLATE SUBSTANTIVE DUE PROCESS DOES NOT WARRANT REVIEW BY THIS COURT, NOR SHOULD THE PETITION BE HELD FOR *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES* OR *AUSTIN V. UNITED STATES*.

The union argued below that the civil contempt fines in this case are "so excessive that they violated

substantive due process and federal labor policy." 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). The Virginia Supreme Court held that the fines were "not . . . excessive as a matter of law," for the following reasons: (i) "the record discloses that the Union committed more than 500 separate violations of the trial court's injunction[;]" (ii) the fines are not excessive in light of "the magnitude of the injunction violations[;]" (iii) the fines are not excessive in light of "the Union's vast financial resources[;]" and (iv) the fines are not excessive in light of the fact that "the Union never represented to the court that it regretted or intended to cease its lawless action." 244 Va. at 479-80, 423 S.E.2d at 358 (App. 18a-19a).

This holding presents no certworthy issues:

First, while the Virginia Supreme Court's decision expressly held that the fines in issue were not excessive, the Court was not called upon to address the question of whether the Excessive Fines Clause of the Eighth Amendment applies either to the States generally or to court-imposed civil contempt fines in particular. The decision below addresses only the Union's contention that the fines "are so excessive that they violate *substantive due process* and *federal labor policy.*" 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). The decision below, therefore, raises no issue about the application of the Excessive Fines Clause of the Eighth Amendment to the states or to court imposed civil contempt fines.

Second, the Virginia Supreme Court's conclusion that the fines are not "excessive as a matter of law" is consistent with the broad proportionality principles discussed by this Court in cases such as *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). The decision below holds that the fines imposed, while "large," are not disproportionate to the *number* of violations committed by the Union; the *magnitude* of the violations (most of which involved violence); and the Union's "*vast financial resources.*" 244 Va. at 480, 423 S.E.2d at 358 (App. 18a-19a). Moreover, the Virginia Supreme Court found that the large fines are justified and

necessary in this case because "the Union never represented to the court that it regretted or intended to cease its lawless actions." *Id.* This analysis is thoroughly consistent with the proportionality analysis approved in *Haslip*, and, at most, presents an unremarkable application of those principles.

Indeed, the fact that the sanctions imposed reached high amounts is simply reflective of the unprecedented level of scorn with which the strikers treated the injunctions. *See Madden v. Grain Elevator, Flour & Feed Mill Wkrs., etc.*, 334 F.2d 1014, 1022 (2d Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

Nor is there any reason to hold this petition pending disposition of either *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), or *Austin v. United States*, No. 91-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993). *TXO* involves two particular questions that are not meaningful in this case. First, *TXO* concerns what procedures are required, in terms of jury instructions and post-trial and appellate remittitur review, to confine unbridled *jury discretion*. Obviously, those procedural questions have no genuine relevance to contempt proceedings. Second, *TXO* concerns the substantive limitations on jury awards adopted by the Supreme Court of West Virginia, based on the difference between "stupid" and "mean" defendants. The legitimacy or utility of those substantive limitations have no bearing on the question of how much money is reasonably required to achieve compliance by a recalcitrant party.

Austin is similarly distant in its relevance to this case. In *Austin*, the Court may decide whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture actions brought by the government. But the decision below holds *nothing* about the application of the Excessive Fines Clause. Rather, it addresses only (and briefly) the Union's challenge under "substantive due process and federal labor policy." 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). Moreover, the proportionality

concerns applicable to civil forfeiture, which is designed to punish the defendant for his wrongdoing, is not directly relevant to the issue in this case – how much money is reasonably necessary to make the Union comply with court's orders.

In addition, both *TXO* or *Austin* could not be controlling of this case for a more basic reason. Both of those cases involve proportionality as it relates to *punishment* for *completed conduct*. This case, by contrast, relates to the amount of money that is necessary to *coerce* a defendant to stop *ongoing conduct*. The difference, which is the same difference that separates "civil" from "criminal" contempt, is an important one. Similarly, what is proportional as *punishment* in *TXO* and *Austin* has no meaningful relationship to what is necessary to *coerce* (rather than punish) a defendant into compliance with court orders.

In sum, *TXO* and *Austin* have no real relevance to what a court can do to achieve compliance with its orders. Further review of the Union's excessiveness claim is, therefore, unwarranted.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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